

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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August 6, 2004

Ray Van Der Nat
1626 Beverly Blvd.
Los Angeles, CA 90026

Re: Public Works Case No. 2003-037
Long Beach Queensway Bay Project
City of Long Beach

Dear Mr. Van Der Nat:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced construction under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). This determination is based on my review of the facts of this case and an analysis and application of the precedential determinations governing public works coverage in effect on the date of the agreement memorializing the material terms of the construction of Long Beach Queensway Bay ("LBQB"). I conclude that the parking and infrastructure construction is public work but that the construction of the retail portion is not a public work.

The governing precedential determinations for this determination are *Pal-Mart Shopping Center, Lake Elsinore, PW 93-012* (July 7, 1994) and *Factory Outlet Center, Pismo Beach, PW 94-034* (February 28, 1995). Subsequent to the agreement for LBQB, the Director issued the determination in *Vineyard Creek Hotel and Conference Center, PW 2000-016* (October 16, 2000), which found that the decision whether a construction undertaking is a single or multiple project must be made on a case-by-case basis. The Director found that five factors have to be considered:

(1) the manner in which the construction is organized in view of, for example, bids, construction contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and (5) the general interrelationship of the various aspects of construction. ...In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts by the parties, which controls. Under Labor Code section 1720(a), if there is a single project involving the payment of public funds, prevailing wages will apply to the entire project; if there are multiple projects, prevailing wages may apply to one project but not another, depending on the circumstances.

If the agreement in LBQB had postdated October 16, 2000, the infrastructure, parking and retail improvements would arguably be considered one public work project for which prevailing wages would be due because of the infusion of public funds to the infrastructure and parking portions.

Factual Background

Pursuant to an Amended and Restated Development and Disposition Agreement ("ARDDA") dated December 30, 1999, the LBQB project is the construction of one parking structure and two surface parking lots ("parking improvement"); necessary infrastructure work, such as increased sewer, water and electrical capacity ("infrastructure improvement"); and retail, restaurant and entertainment structures ("retail improvement"). All of the land is publicly owned reclaimed tidelands, leased to DDR Urban LP ("DDR"). The sites of the parking improvement are adjacent to the retail improvement, located across public thoroughfares; the infrastructure improvement is adjacent to the retail improvement.

The parking and infrastructure improvements are financed by the City of Long Beach ("City") through the issuance of two series of Mello-Roos Tax Bonds. City has contracted with Bomel Construction to build the parking structure. City has contracted with Excel Paving for one of the surface parking lots. City designated DDR as its construction manager for all aspects of the publicly financed construction and will pay DDR a flat fee of \$227,300. Prevailing wages are being paid under these contracts. DDR has contracted with Snyder Langston for the second surface parking lot and the infrastructure improvement called for in the ARDDA. The construction contracts for this work require the payment of prevailing wages.

DDR also has contracted with Snyder Langston for the construction of the retail improvement under a separate contract that does not require the payment of prevailing wages.

City has caused an environmental site assessment to occur. While City obligated itself to pay for the first eight bore holes and to give DDR a rent credit for the first \$750,000, DDR represents that there were no bore holes drilled and that DDR does not claim any entitlement to a rent credit from City.

Analysis

The law applicable to the determination whether a construction undertaking is a public work subject to prevailing wages is that statutory, decisional and administrative law in effect at the time the agreement memorializing the material terms of the project was entered into. The agreement memorializing the material terms of the LBQB construction is the ARDDA, which was executed in December 1999.

In December 1999, Labor Code section 1720(a) (Stats 1989, ch. 373) defined "public work" as:

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Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds.

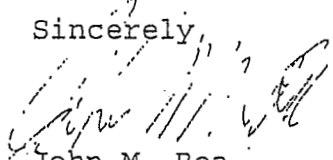
A threshold question in analyzing the public works status of the LBQB construction is whether it is a single project or multiple projects. At the time of the ARDDA, two precedential determinations governed this question. In *Wal-Mart Shopping Center, supra*, the Director found that, where publicly financed infrastructure improvements are constructed under separate construction contracts from a privately funded shopping center, prevailing wages only have to be paid on the construction of the infrastructure. Similarly, in *Factory Outlet Center, supra*, the Director followed this analysis even where both publicly financed infrastructure and privately financed development were described in a single Owner's Participation Agreement ("OPA") as long as the OPA clearly delineated a requirement that the construction contracts for each aspect of the project be separately let.

Here, the retail improvements were constructed under a separate construction contract from the publicly funded parking and infrastructure improvements. Therefore, under *Wal-Mart* and *Factory Outlet Center*, the construction of the retail improvements is a separate project from the construction of the parking and infrastructure improvements.

Applying the 1999 version of Labor Code section 1720(a) and the precedential determinations in effect in December 1999 to the LBQB construction, all the work is construction done under contract. The parking and infrastructure improvements were publicly funded and thus are public works for which prevailing wages are required. The retail improvements, however, are privately funded and therefore not a public work.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John M. Rea
Acting Director